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Trial Pros: Milbank's Daniel Perry

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Daniel Perry

Dan Perry is a partner in the New York office of Milbank Tweed Hadley & McCloy LLP and practice group leader of the firm's litigation and arbitration group.

Perry represents clients in federal and state court in complex commercial disputes involving securities and corporate law, mergers and acquisitions, insurance and reinsurance and financial restructuring. He also represents clients in a range of industries facing various regulatory and criminal investigations. He has experience trying cases and also managing disputes out of court and in arbitration. Perry has been called in to represent large, institutional clients in precedent-setting cases involving complex financial instruments.

Among the notable civil litigation matters that Perry has handled at Milbank are representing funds in litigation brought in connection with failed acquisitions, claims against portfolio companies, partnership disputes and securities cases; representing financial institutions in connection with various complex commercial, securities and mergers and acquisitions litigation; representing various financial institutions and funds in connection with litigation arising out of RMBS, CMBS, CDOs and other structured products; representing insurers and reinsurers in connection with reinsurance arbitrations involving both property/casualty and life; and representing debtor and creditor clients in connection with complex financial restructuring litigation.

Q: What's the most interesting trial you've worked on and why?

A: We tried a case in the Southern District of New York on behalf of a large financial institution against a foreign investor seeking to arbitrate claims before Financial Industry Regulatory Authority. The investor had engaged in transactions with my client's affiliates in Switzerland and the U.K. The problem for the investor was that the Swiss and English courts did not recognize the type of claim he was seeking to bring. We engaged in a 10-day trial to determine whether the investor was a client of our client's U.S.-based broker dealer and, therefore, able to initiate claims before FINRA.

The trial was interesting because the legal issue at play was unsettled and the factual disputes were substantial. The factual disputes revolved around whether the investor really believed that he was a customer of the U.S. entity (when all of the contracts and most of the contacts at issue were with U.K. and Swiss entities and individuals). This is not atypical in my experience — cases are most often tried when there is a sharp and meaningful disagreement about the facts and the law. We were able to prevail at trial and on appeal, and the Second Circuit established a bright line test to determine when an

investor is a client of a U.S. broker dealer under FINRA's rules.

It was ultimately the broader policy implications that made this trial interesting. Beating back the effort of foreign investors to sue a U.S.-based financial institution for a transaction entered into with its foreign affiliates was important and meaningful. Financial institutions spend a lot of time and resource ensuring that their conduct is lawful and appropriate in the jurisdiction in which they choose to do business. It was great to put on a case that had an impact far beyond the immediate dispute before the court.

Q: What's the most unexpected or amusing thing you've experienced while working on a trial?

A: I once had a judge observe in oral argument on a summary judgment motion that if he denied the motion he expected my clients to "fight like tigers" at trial. This became a bit of a rallying call within our team. And all of the attorneys decided that they would wear a just a bit of tiger-inspired apparel at trial. Tiger cufflinks, tiger-striped shoes and orange and black ties all appeared at trial. It seems like something like this occurs in every trial — there is always an inside joke or two that brings the team together. The key is never to take yourself too seriously.

Q: What does your trial prep routine consist of?

A: I am not someone that ever tries to "wing it" during trial. Trial work involves an enormous amount of preparation. The reason that great trial lawyers make the job look easy is not because it is naturally easy for them. It is because they have prepared exhaustively and understand the points they need to make and how they will make them with each witness.

When preparing my written prep material, one of the things that I have found most effective is to dictate my presentation outlines. Too often, you will see attorneys simply reading their written material read aloud. The problem is that it is more difficult for the listener to follow and comprehend a presentation that is given in the same way you might write a brief. Dictating the presentation gives your written material more of an oral quality. That makes it easier for witnesses and the fact finder to follow you. And it can also make the presentation take on more of an extemporaneous tone, which I think keeps all of your the listeners more engaged. As an added bonus, dictating takes less time than sitting down to write something — so this is a technique that will improve efficiency. I have an "old school" assistant that makes this easy on me. But the new phones and tablets all seem to have a voice entry function that makes this easy.

Q: If you could give just one piece of advice to a lawyer on the eve of their first trial, what would it be?

A: Have fun. You have, I hope, put in the long hours required to prepare properly for trial. You have participated in document discovery, pretrial briefing and depositions. Much of that can be interesting, challenging and stimulating. But it can also be lengthy and tedious. The hard part is over. Trial is the fun part of the case. I have never met an experienced litigator that does not really enjoy trial. Take it all in, learn as much as you can and enjoy the process.

Q: Name a trial attorney, outside your own firm, who has impressed you and tell us why.

A: This question is hard to answer because many of the lawyers I have tried cases with and against are very skilled. Joel Friedlander at Friedlander & Gorris is someone that is very impressive. Joel is a Delaware lawyer that practices primarily in the Delaware Chancery Court and usually appears on the plaintiff side of the caption. He is very good at making complicated points with enough detail and

thought that he moves his case forward, but, at the same time, does so without delving so far into the minutiae that the fact finder gets lost. Figuring out the appropriate level of detail to present at trial can be tough to navigate, particularly in complex business cases involving often arcane practices and complex legal issues.

Joel is also good at taking — what I often consider — aggressive or novel positions and framing them in a way that makes them seem straightforward and well-established in the law. Getting the fact finder comfortable (legally and factually) with the result you are seeking is one of the principal goals of any good trial presentation — and Joel does that well.

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